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No. 90-666

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARSHA FELDMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
JOHN R. DUNNE
Assistant Attorney General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in holding that petitioners' motion to intervene pursuant to Fed. R. Civ. P. 24 was untimely.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 908 F.2d 197. The minute order of the district court and its findings (Pet. App. 7-12) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1990. The petition for a writ of certiorari was filed on October 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1973, the United States filed suit against the City of Chicago, alleging a pattern or practice of race and sex discrimination in hiring and promotion within the City's Police Department in violation of Title VII of the Civil

[1] The appendix to the petition is not paginated. Citations in this brief to "Pet. App." assume pagination in numerical order. Citations to "R." refer to the district court record.

Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 1-2. In December 1974, prior to trial, a group of women who sought to become Chicago police officers were permitted to intervene in the action as plaintiffs. The district court subsequently denied the intervenors' motion to certify a class of women who had been denied employment with the Chicago Police Department. *United States* v. *City of Chicago,* 411 F. Supp. 218, 243 (N.D. Ill. 1976).

In January 1976, the district court issued a decision finding, *inter alia,* that Chicago had followed an explicit policy of refusing to hire and promote women on the same basis as men. The court found that the 1971 examination for entry level police officers, and the 1973 examination for promotion to sergeant, had a disproportionate adverse impact on blacks and Hispanics and had not been shown to be job-related. *United States* v. *City of Chicago, supra.* The district court entered a decree in February 1976 directing the United States to conduct discovery necessary to seek awards of backpay and retroactive seniority relief for all identifiable victims of the City's unlawful discriminatory promotion practices. 411 F. Supp. at 251. The court said that "[a]bsent an agreement among the parties as to the amount of awards and adjustments to be made to identified members of the affected classes, ancillary proceedings will be instituted in respect thereto." *Ibid.*

In December 1978, the United States requested an order scheduling ancillary proceedings. In addition, two of the female intervenors filed individual motions for backpay and seniority adjustments. Hearings on the individuals' motions were not held until February 1987; the court never ruled on the government's request for ancillary proceedings.

In April 1988, the United States and the City filed a joint motion for approval of a consent decree resolving the backpay and seniority issues. The proposed consent decree

established an interest-bearing backpay fund of over $9 million to be distributed among four categories of persons adversely affected by the City's discriminatory employment practices.[2] The decree also provided for adjustments in the seniority dates of members of the affected groups whose hiring or promotion was delayed as a result of discrimination. Pet. App. 2

2. A group of women, including petitioners, filed objections to the consent decree on July 25, 1988. On August 1, 1988, petitioners sought to intervene in the action for the purpose of filing petitions for individual relief. Pet. App. 2.

On June 5, 1989, the district court held a hearing on the objections to the decree, at which petitioners' counsel was heard. On June 6, 1989, the district court entered an order denying petitioners' motion to intervene. Pet. App. 7. The court noted that the two plaintiff-intervenors whose petitions for individual relief had previously been heard by the court "were in th[is] case from the beginning." *Id.* at 9. The court found that allowing the petitioners to intervene after the United States and the City had negotiated a consent decree that was acceptable to approximately 90% of the victims of the discrimination "would in essence scrap the settlement[,] [f]or if one can do it, all can do it." *Id.* at 10, 11. The court further stated that this was neither "the time [n]or the place" to convert the claims that were advanced by the United States on behalf of women in the Chicago Police Department to individual claims. *Id.* at 12.

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[2] The four categories are: (1) female applicants for and incumbents of uniformed police positions who were barred from male-only patrol officer positions; (2) a group of incumbent minority (black and Hispanic) male patrol officers who were adversely affected by the 1968 or 1971 patrol officer exam; (3) female incumbents of uniformed police positions who were barred from taking the 1968 sergeant exam; and (4) a group of incumbent minority male sergeants who were adversely affected by the 1968 sergeant exam.

On June 7, 1989, the district court approved the consent decree. It found that the settlement embodied by the decree is "fair, is based upon the record, is not arbitrary and capricious, and * * * serves the interests of those parties and persons for whom this litigation was brought and by whom it was defended." C.A. App. A-4, at 11.

3. The court of appeals affirmed. Pet. App. 1-6. The court held that the district court did not abuse its discretion in finding that petitioners' motion to intervene was untimely. *Id.* at 3-4. Following this Court's decision in *NAACP* v. *New York*, 413 U.S. 345, 366 (1973), the court of appeals recognized that the determination whether a motion to intervene is timely must be made in the context of the "totality of the circumstances." Pet. App. 3. Among the circumstances noted by the court of appeals was the fact that "this case should be winding down." *Id.* at 4. The court observed that

> [l]itigation will have no end if every time parties resolve amicably (or drop) a point of contention, someone else intervenes to keep the ball in the air. . . . It was not an abuse [of discretion] to deny this application and so bring closer the finale of this exhausting case.

Ibid. (quoting *United States* v. *City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990)).

ARGUMENT

The court of appeals' fact-bound decision is correct and does not conflict with any decision of this Court or any other court of appeals. Consequently, this case warrants no further review.

1. Motions to intervene as of right under Fed. R. Civ. P. 24(a), as well as motions for permissive intervention under Fed. R. Civ. P. 24(b), must be timely. *NAACP* v.

New York, 413 U.S. 345, 365 (1973). The determination whether a motion to intervene is timely is committed to the sound discretion of the district court, to be determined from all the circumstances. *Id.* at 366. Petitioners do not dispute these settled principles, but argue instead that the district court abused its discretion in applying them to this case. Petitioners' fact-specific argument is unconvincing.

This well-publicized action was brought by the United States in 1973. Petitioners do not deny that they have long been aware of it.[3] Rather, they contend that they justifiably relied on the United States to represent their interests, and that they were entitled to intervene once they determined that the consent decree negotiated by the United States and the City was unacceptable to them. Petitioners note (Pet. 30) that the district court's 1974 order declining to certify a class of women denied employment by the City stated that the United States "will adequately represent those injured" by the City's illegal discrimination. 411 F. Supp. at 243. As petitioners also note, however (Pet. 30-31), the United States, in its response to the 1973 motion to intervene, stated that speculation concerning the adequacy of its representation of females "on the issue of final remedy and backpay" was premature "since those issues have yet to be litigated."

Even if petitioners are correct, in arguing that the time for filing motions for intervention was in effect tolled by the district court's 1974 finding of adequate representation by the United States, the time began running again in 1976 when the district court announced that remedial issues would be decided either by settlement or, if necessary,

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[3] Petitioner Feldman has known of the action since at least August 27, 1980, when she was permitted to intervene on the separate issue of a promotional goal for women sergeants.

ancillary proceedings, *United States* v. *City of Chicago*, 411 F. Supp. at 251. At this point, at the latest, petitioners were informed of the possibility that the remedial issues might be resolved through settlement negotiations. Because settlements typically involve compromise, petitioners "should have known the risks of waiting" for the outcome of negotiations. *County of Orange* v. *Air California*, 799 F.2d 535, 538 (9th Cir. 1986), cert. denied, 480 U.S. 946 (1987).

Petitioners also cannot excuse their failure to examine positions taken by the United States on remedial issues to determine whether those positions met with their approval. Petitioners were in a position to know as early as 1978, when the United States filed its motion for an order scheduling ancillary proceedings, that the United States' theory of relief differed from the theory petitioners now seek to advance in ways critical to their individual claims.[4]

But petitioners did not move to intervene in 1976 or 1978. Instead, petitioners waited until 14 years after other women had intervened in this action and 10 years after two of those intervenors had filed petitions for individual relief. Petitioners sought to intervene only after the United States and the City—following a year of negotiations—had proposed a comprehensive settlement of backpay and seniority adjustment issues.

2. The district court found that allowing intervention by petitioners to present petitions for individual relief after the City and the United States had agreed to the terms of a consent decree would greatly prejudice those original parties: it "would in essence scrap the settlement." Pet. App. 10; see also *id.* at 11. The courts of appeals have

[4] See R. 838, 840 (Motion of the United States for an Order Setting Ancillary Proceedings on Back Pay and Seniority Issues, and Memorandum in Support Thereof); R. 1447 (Memorandum of the United States in Response To Defendants' Supplemental Memorandum Concerning Claims of Plaintiffs Burauer and McNamara at 5, 7).

uniformly looked with disfavor upon attempts to intervene on the eve of settlement, seeking to "avoid [the] risk of the hard-won settlement package becoming undone," *Moten* v. *Bricklayers Int'l Union*, 543 F.2d 224, 228 (D.C. Cir. 1976). See also *Culbreath* v. *Dukakis*, 630 F.2d 15, 21-22 (1st Cir. 1980) (such a procedure would "encourage putative intervenors to sit on their rights to the detriment of the parties carrying the load of the lawsuit"); *County of Orange* v. *Air California*, 799 F.2d at 538 (fact that proposed intervenor "waited until after all the parties had come to an agreement after five years of litigation should * * * weigh heavily against" him); *Lelsz* v. *Kavanagh*, 710 F.2d 1040, 1045 (5th Cir. 1983); *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 579, 584-585 (6th Cir.), cert. denied, 459 U.S. 969 (1982).[5]

Would-be intervenors are obliged to move to intervene when they learn their interests are at stake. See *NAACP* v. *New York*, 413 U.S. at 364-369. Here, petitioners were on notice by 1976 at the latest that the remedial phase of this litigation might be resolved by settlement. Petitioners did not seek to intervene until more than 12 years later, after the United States and the City had reached a settlement agreement. The district court did not abuse its discretion in holding that, in the circumstances of this case, petitioners waited too long to assert their rights.[6]

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[5] This Court's decision in *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989), does not support petitioners. The issue in that case was not whether to grant a motion to intervene under Fed. R. Civ. P. 24, but whether persons who did not seek to intervene in an action could challenge decisions taken pursuant to a decree entered in the action.

[6] In addition, as the court of appeals noted, petitioners' motion to intervene probably should have been denied on other grounds as well. Pet. App. 4-5 n.2. As to intervention of right, it is far from clear that petitioners' interests were not adequately represented by the United States. And as to permissive intervention, the court of appeals noted that "[i]t is beyond question that both substantial delay and prejudice will result to the parties if [petitioners] are allowed to intervene at this late date." *Id.* at 5 n.2.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
JOHN R. DUNNE
Assistant Attorney General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys

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